THE REAL ECONOMY AND COMPETITION POLICY IN PERIODS OF RETRENCHMENT

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Abstract
Competition policy works well when markets are given time to evolve and drive improved efficiency; but this takes time. However, under current turbulent times, the short-run survival actions may be insistently sought by policy-makers under the pressure of trade unions and the exit of failing firms may be perceived to be more costly for society. Actually, the immediate costs that existing businesses, employees and consumers have to incur may be up-front and visible, while the benefits of competition may be less visible.
As a consequence, times of severe financial and economic crises bring about a severe questioning of market mechanisms with unfailing regularity and the stance of the competition policy against this backdrop.
We shall therefore look in the current paper at the role of competition authorities in a time of severe economic and financial crisis and in particular, at how the crisis will impact the application of competition law. In the end, we will conclude in favour of the need to preserve competition policy as well in difficult times even if we admit that a certain flexibilisation in procedures (but not in rules) may be probably necessary.

Keywords: retrenchment, antitrust and merger control, state aid policy, competition authority

JEL Classification: L4, L5

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[**] The views expressed herein are those of the authors and do not necessarily represent those of the Federal Trade Commission or any individual Commissioner.

Introduction

The crisis arose in the US financial sector, one of the most developed of the world and grew, on the one hand, because prudential regulation did not prevent banks from taking excessive risks and, on the other hand, because the asset valuation method had magnifying effects which weakened the banking sector in a period of rapid decline in the value of financial assets, the result of which was to worsen the systemic risk that the sector was facing. Actually, dangerous incentives leading to moral hazard, asymmetry of information, and poor regulation were the main reasons of this crisis.[1]

Unlike what happens in most goods and services markets, where a firm's failure represents an opportunity for its rivals, the failure of a firm in the banking and financial sector is liable to have systemic effects in the banking system as a whole. Indeed, the experience of Lehman Brothers has shown that the uncontrolled disappearance of players with a flawed business model may effectively hurt the remaining banks.

1. Lessons from history[2]

In considering possible responses to the economic crisis, the world is not writing on a blank slate. In the not-so-distant past, a major financial institution failed. The existing regulatory structure proved inadequate to solve the problem. Public confidence in the financial system fell, and the system itself was in danger of collapse. A major financial firm found itself in financial distress, largely because of the imminent failure of an industrial firm it controlled. At the last moment, however, the dominant competitor of the industrial firm stepped forward and offered to buy it, which would in turn have saved the financial firm.

There was only one obstacle: because the bailout might have resulted in the creation of a monopoly at the level of the industrial firm, the engineers of the rescue faced the threat of enforcement of the competition law against the bailout. To this, the would-be rescuers argued that the financial crisis constituted an emergency that justified subordination of the competition law to the greater interest in protecting jobs.

While this scenario might be thought to refer to the present day, in fact it describes the American financial panic of 1907, which took place only 17 years after US first antitrust law was passed.[3] The dominant industrial firm was United States Steel, which was controlled by the industrialist J.P. Morgan. A major investment house was about to fail, and it held stock in a failing coal company. Morgan's solution was for U.S. Steel to buy the coal company, which would in turn save the investment house (as well, perhaps, as strengthening U.S. Steel's own position given its own interests in the coal business). Morgan sent his emissaries to meet with then-President Theodore Roosevelt, bypassing the Department of Justice, which at the time was the sole enforcer of the antitrust law.[4] They

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[1] OECD Financial Market Trends, *The Current Financial Crisis: Causes and Policy Issues,* 2008.

[2] The discussion in this chapter draws heavily from Winerman, M., *Antitrust and the United States Financial Crisis of '07*, The Antitrust Source (2008), available at http://www.abanet.org/antitrust/at-source/08/12/Dec08-FullSource12-22f.pdf.

[3] Sherman Antitrust Act, 15 U.S.C. §§1-2.

[4] The Federal Trade Commission would not be created until 1914.

persuaded Roosevelt that the greater industrial policy goal of saving the financial system justified the merger, and Roosevelt personally approved the deal.[5]

So what happened? It turned out that the failing coal company in fact produced a type of coal that was especially well-suited to a new technology that was coming on line – and U.S. Steel now controlled it. Whether the deal was in fact anticompetitive is unknown, but as there had been no investigation, there was never an opportunity to consider this fact. A few years later, the Justice Department under the next President tried to challenge the deal as part of a broader challenge to U.S. Steel. When the case reached the Supreme Court some years later, the Court rebuffed the challenge, partly on the grounds that President Roosevelt had approved it.[6] Because of US common law system, in which Supreme Court precedents become incorporated into the law, that precedent may have made it harder to challenge mergers. That, in turn, may have contributed to the wave of concentration that took place in the 1920s.[7]

One need only move the clock forward to the next economic crisis, the Great Depression of 1929, to find out whether anything had been learned from this experience. In 1933, another President Roosevelt (Franklin) took office and tried to stem that crisis. Some measures seemed to help, such as enacting securities regulation. But Roosevelt also persuaded the Congress to pass the National Industrial Recovery Act.[8] This law essentially legalized cartels and suspended enforcement of American antitrust law. It authorized firms to establish “industrial codes” that were subject to nominal government review and were enforceable by the government. Armed with this new authority, industries did about what might have been expected: they established cartels that restrained price and constrained output, all justified in the name of preventing “disruptive” and “wasteful” competition. The very language of commerce changed – discounters were called “chiselers,” a pejorative term in English.

The effect of the NIRA has been well documented. The current Chairman of the US President’s Council of Economic Advisors wrote, while an academic, that “the more important effect of the NIRA was to diminish the responsiveness of price changes to the deviation of output from the trend. . . . It prevented the economy’s self-correction mechanism from working. Thus, the NIRA can be best thought of as a force holding back recovery.”[9] One academic found that output was depressed by 10% due to the NIRA.[10] In the end, the NIRA made the depression longer and more severe than it would otherwise have been.[11]

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[5] It is highly unusual for the President to become personally involved with the direct enforcement of the antitrust laws, which is normally left to the Department of Justice and Federal Trade Commission.
[6] United States v. United States Steel Corp., 251 U.S. 417, 446–47 (1920).
[7] William E. Kovacic, Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration, 74 IOWA L. REV. 1105, 1112, 1115–16 (1989).
[8] Act of June 16, 1933, Ch. 90, 48 Stat. 195 (formerly codified at 15 U.S.C. § 703),
[9] Christina Romer, “Why Did Prices Rise During the 1930s?” *Journal of Economic History*, 59(1), 167-199, p. 197.
[10] Jason Taylor, “The Output Effects of Government Sponsored Cartels During the New Deal,” *Journal of Industrial Economics,* 50, 1-10 (2002).
[11] Shapiro, C., Deputy Assistant Attorney General for Economics, U.S. Department of Justice,“Competition Policy in Distressed Industries,” Remarks Prepared for Delivery to American

Ultimately, the United States Supreme Court declared the NIRA unconstitutional in 1935. By then, Roosevelt had realized that it had been a bad idea. He changed course and appointed strong antitrust enforcers, who began to resume enforcement of the antitrust laws. The climate that led to the passage of NIRA, which favored protecting firms from competition, had other effects that were not so easy to eliminate. We'll give two examples.

The airline industry in the United States, which was in its adolescence if not still in infancy, had originally been dependent on airmail subsidies to survive. By the 1930s, new technology had led the industry to the point where airlines could begin to make a profit carrying passengers. And indeed, some innovative new carriers began to move into the market to compete with the holders of the airmail contracts. One, for example, offered the innovative idea of flying hourly between New York and Washington, much to the distress of the airmail contract holder which served the route only as part of longer routes from New York to the south.[12] At the request of the incumbent airlines, which claimed to need protection from harmful competition, Congress enacted a pervasive regulatory scheme in 1938 that regulated entry, price, and routes. While airlines could still compete on the basis of food service and schedules, they had no reason to fear entry or price competition.

At the same time, as US highway system was becoming better, trucking emerged as a viable competitor to the railroads. The railroad industry had long been regulated by the Interstate Commerce Commission, at first to protect the interest of farmers, shippers, and passengers. Eventually, it seemed to be more concerned with protecting the railroads themselves. At the behest of the railroads, the ICC was charged with regulating the trucking industry. Routes were fixed, so that if a trucking route held a route from New York to Florida and another from Florida to Chicago, it could only haul freight from New York to Chicago via Florida. Manufacturers and sellers began setting up their own trucking operations, but their trucks had to return home empty. Rates were also fixed. The system was grossly inefficient, and since transportation is a major component of the price of many goods, the costs were often paid by the consumer.[13]

While the Depression ended with World War II, these regulatory schemes persisted until the 1980s, by which time the "infant" airline industry was flying 747s. Eventually both industries were deregulated. Costs came down and innovative new entrants came into the market.[14] The lessons to be learned are that a regulatory response intended to provide a respite from market forces in response to a short-term economic crisis is unlikely to succeed, produce unanticipated counterproductive results, and can give incumbents and opportunity to entrench themselves in ways that will take decades to reverse.

Moving to the present, the pertinent issue is how these issues are being addressed. What have we learned from previous similar situations? How are authorities responding to current challenges? These are the questions we will try to address in the following parts.

Bar Association Antitrust Symposium (May 13, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245857.htm.

[12] Van der Linden, R.F., *Airlines And Air Mail: The Post Office and the Birth of the Commercial Aviation Industry*, 192-95 (Univ. Press of Ky. 2002).

[13] Trucking Deregulation in the United States, Submission by the United States to the Ibero-American Competition Forum, September, 2007, *available at* http://www.ftc.gov/bc/international/docs/ibero-trucking.pdf .

[14] Robert Crandall and Jerome Ellig, Economic Deregulation and Customer Choice, 34-47.

2. Addressing the current financial crisis

After the collapse of Lehman Brothers, many governments around the world promptly intervened in order to secure the short-term viability of their financial system by means of guarantees, recapitalization measures and urgent implementation of mergers on claims of national security or 'systemic risk'.

The more recent reactions of Europe and US to the credit crunch constitute examples of government interventions into economy and subsequently, challenges for competition law and policy. For instance, the UK government permitted, without consulting with its competition authority, the merger of Lloyds and HBOS[15], a merger which would not have probably passed otherwise the competition test. In Ireland, limitation of state guarantees by the Irish government only to the six national banks led to a massive withdrawal by the depositors of the accounts in Great Britain or in the Irish banks.

More recently, in the US, the government intervention for saving AIG insurance company from financial collapse already proves the negative effects of applying a selective protectionist policy. Thus, the rivals of AIG Company have already expressed publicly their discontent with the fact that immediately after receiving a financial aid of 173.3 billion dollars, the company began to apply an aggressive policy of cutting the fees for some services in its portfolio, causing a fall in prices of more than 30%[16]. Further, the chain of mergers facilitated by the US treasury will leave the US with highly concentrated financial markets[17].

However, completing financial sector repair and reforming prudential frameworks are indispensable for a return to sustained growth. A key to a resumption of normal lending is the restructuring of the financial firms'activities. As explained in more depth in the October 2009 IMF Global Financial Stability Report (GFSR), it definitely requires the adoption of long-term viability measures such as balance sheet cleansing, deep restructuring in individual banks, new business plans and new prudential frameworks.

3. Addressing the current economic crisis

The financial crisis that initially affected the banking sector has in turn had an impact on the real economy. The world entered its first collective economic recession since World War II. The IMF GFSR suggested in October 2009 that while global GDP will contract by about 1 percent in 2009, global activity is forecast to expand by about 3 percent in 2010, which is well below the rates achieved before the crisis. Of the world's major economies, only China and India will register GDP increases this year. These projections reflect modest upward revisions to those in the July 2009 *WEO Update* presented below in table no. 1.

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[15] Great Britain, *OFT statement on proposed merger between Lloyds TSB and HBOS*, Press release 108-08, 2008, September 18.

[16] *USA Inc: AIG's Rivals blame bailout for tilting insurance game*, Wall Street Journal, 2009, March, 23.

[17] See Degryse and Ongena, who in *Competition and Regulation in the Banking Sector: A Review of the Empirical Evidence on the sources of bank rents*, published in A. Thakor and A. Boot (eds.), Handbook of Financial Intermediation and Banking, Elsevier, assess the whole literature with respect to the consolidation of the financial system and its consequences (2008, p. 483-542).

Table no. 1: 2009 Real GDP Growth

2009 Real GDP Growth	2009	2010
World	-1.4	2.5
Advanced economies	-3.8	0.6
Emerging and developing economies	1.5	4.7
Developing Asia	5.5	7.0
Africa	1.8	4.1
Central and Eastern Europe	-5.0	1.0
Commonwealth of Independent States	-5.8	2.0
US	-2.6	0.8
Germany	-6.2	-0.6
France	-3.0	0.4
Italy	-5.1	-0.1
Spain	-4.0	-0.8
Japan	-6.0	-1.7
UK	-4.2	0.2
Canada	-2.3	1.6
Russia	-6.5	1.5
China	7.5	8.5
India	5.4	6.5
Brazil	-1.3	2.5
Mexico	-7.3	3.0

Source: World Economic Outlook Update, IMF, July 2009.

However, the same IMF GFSR concludes in optimistic terms that "*after a deep global recession, economic growth has turned positive, as wide-ranging public intervention has supported demand and lowered uncertainty and systemic risk in financial markets. The recovery is expected to be slow, as financial systems remain impaired, support from public policies will gradually have to be withdrawn, and households in economies that suffered asset price busts will continue to rebuild savings while struggling with high unemployment. The key policy requirements remain to restore financial sector health while maintaining supportive macroeconomic policies until the recovery is on a firm footing. However, policymakers need to begin preparing for an orderly unwinding of extraordinary levels of public intervention*"[18].

4. Role of competition policy protection

While the 1990s and the early 2000s saw competition law acquiring growing power to shape the economic activity worldwide, it is now clear that government intervention and regulation – more intrusive than competition law – on which hopes for economic recovery and a return to prosperity are now pinned. Therefore, this dire financial and economic situation poses significant challenges for competition policy.

Usually, competition protection policy has positive microeconomic effects that translate into lower prices, higher output, more alternatives for the consumers, and increased innovation. However, there are opinions arguing that it may have as well macroeconomic effects, mainly influencing stock markets and business cycle. Thus, tough antitrust policy may somehow explain lower level of investments during certain periods in the past. But this does not mean that competition policy is one of the reasons for the current economic and financial crisis.

As shown above, history abounds in evidence providing that relaxing or sometimes even suspending competition rules, whether in State aid or merger area, would have major negative macroeconomic consequences, because it would harm consumers, impede the manifestation of competition on the merits by keeping inefficient companies in business and ultimately delay the recovery.

The relaxation of the merger control policy during previous economic crises was clearly directed towards promoting protectionist policies and consisted either in allowing otherwise anti-competitive mergers between domestic entities or into prohibiting otherwise pro-competitive acquisitions of domestic entities by foreign entities[19].

Moreover, there is another risk which cannot be underestimated, that in the context of market globalization, the protection of national players and interests by state loans and guarantees might lead to a race among different states for subsidizing their industries. One example when such claims for protection were evident is the Chrysler case in 1980.

At that time, Chrysler's financial difficulties were caused mainly by the fact that it did not respond promptly enough to the consumers' demands for smaller and low fuel consumption cars. Chrysler, which was on the verge of bankruptcy, received US$ 1.2 billion as federal

[18] World Economic Outlook Outdate, *Global Financial Stability Report*, IMF, October 2009.
[19] Elena Carletti, European University Institute, Background Note on *Competition and Financial Markets* prepared for OECD Global Competition Forum, 2009, February - DAF(COMP)/(2009)2.

guarantees of the loan. G. William Miller, Governor of the Treasury at the time these guarantees were granted, said that "*there is a public interest for saving these jobs and a competitive national car industry*"[20]. At his turn, Lee Iacocca, Chrysler's president, claimed that "*governmental guarantees, import quotas and a well-defined industrial policy will be the key to success for American corporations in years to come*".[21] On the contrary, Alfred Dougherty, Jr., Director of the Competition Bureau of the Federal Trade Commission at that time, declared before the American Senate: "*When a company has misperceived or been unable to satisfy the needs and preferences of the consumer, there are little reason should normally exist to preserve the firm through artificial support. Rather, the opposite is generally true. The failure of the firm increases allocative efficiency by removing an inefficient user of economic resources*."[22]

The federal guarantees such as those granted to Chrysler in 1980 had the effect of crowding out private investments and therefore loans for other companies as well as for individuals in the credit market became more expensive and more difficult to obtain. If Chrysler had been pushed into bankruptcy, the resources controlled by the corporation could have been directed to other more efficient players in the car market or outside it. Although job losses caused by Chrysler's potential bankruptcy were estimated to over 720,000[23], in fact, the federal bailout of Chrysler saved only part of these jobs in the short run.

5. How to ensure an effective and coherent public response to the crisis?

Everybody agrees that "the economy can not get back to sustainable growth until the banks were back in order."[24] So, in a first stage, all governments worldwide struggled for restoring the stability of their financial systems by taking short-term and long-term viability measures. In a second stage, there is a need for taking appropriate measures to deal with the *economic crisis*. A first set of measures refer to the "classical" tools that governments may use, i.e. fiscal and monetary policies. The second one refers to methods involving state aid, under various forms and a certain relaxation of the competition policy, mainly merger control. Since the aim of this paper is to find out whether competition policy will lose its major role in market regulation or not under current environment in disorder, we shall focus on the second set of measures, drawing on EU evolutions in competition law and policy.

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20 *Chrysler's Crisis Bailout,* Time Magazine (August 20, 1979).
21 Hickel, James K., *The Chrysler Bail-Out Bust,* Backgrounder 276 (1983, July, 13, p. 1).
22 Statement of Alfred F. Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission, before the American Senate concerning *Government Assistance to Chrysler* Corporation (October 10, 1979, p.2).
23 Ibidem note 13.
24 Commissioner Nellie Kroes, Address at OECD Forum: "The Crisis and Beyond: For a Stronger, Cleaner, Fairer Economy", Paris , 23rd June 2009.

"The failing firm defense"doctrine and the EU merger control policy"

In the context of the financial crisis, rescue mergers between banks as well as nationalization of banks by Member States[25] have given rise to new challenges in the application of merger control rules, in terms of both procedural and substantive aspects.

At first sight, it seems that the tight deadlines characterizing the review of economic concentrations by the competition authorities would impede the quick implementation of mergers or acquisitions that sometimes may be required to keep a troubled firm operating. However, the procedural rules regarding mergers may be adapted when necessary to ensure that merger control enforcement would be an adequate and flexible instrument also in times of crisis.

However, so far, adapting the procedural rules governing merger control to the current economic framework has not been required at EU level.

From the viewpoint of the substantive aspects of merger control, under EC antitrust law, merging companies may avail themselves of the "failing firm" defence doctrine. When, absent a merger, one of the merging parties would very likely fail, the merger may be found not to violate article 7 of the EC Merger Regulation no. 139/2004[26]. This argument plays an important role in competition policy by ensuring that merger law does not unnecessarily lead to assets exiting a relevant market. Its application, however, is narrow because merging parties bear the burden of proof that there is no alternative purchaser that would create a less anticompetitive effect.

Moreover, in an economic slowdown, more and more companies can become bankrupt making the "failing firm defense" argument more and more frequently invoked. As a result, one should not neglect the real reasons behind the greater number of failing firms in times of economic crisis.

As a consequence, the present challenges do not justify the temporary relaxation or suspension of the present rules on economic concentrations. In addition, the procedural rules in the field together with an increased vigilance of the competition authorities guarantee an efficient enforcement of merger control and in a way that should support the economic recovery of the companies under difficulties.

EU State aids – part of the solution?

EU competition policy not only enables the EC to act firmly against distortions of competition caused by the conduct of companies. It can also effectively control the impact of State interventions on competition by ensuring that a State subsidy does not create disproportionate and unnecessary distortions of competition.

The objective of State aid control in the EU is therefore to ensure that government interventions do not distort competition and intra-community trade.

[25] To be noted that US did not nationalize banks even during the Great Depression of 1929. However, nowadays, more and more voices claim that nationalizing banks would be the last solution for reviving US financial institutions, according to the Swedish model in the 90's.

[26] See the EC Notice-Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C-31, 05.02.2004.

The Member States of the European Union (EU) can grant state aids either in the context of the *existing* rules and regulations or by enforcing the *temporary framework* that the European Commission (EC) has introduced in order to address the current situation in the real economy and the financial sector.

The general rule is that state aid is prohibited. However, there are exceptions from this general rule for specific policy objectives, in the case of which state aid is considered to be compatible: aid for small and medium-sized enterprises, training aid, regional aid, aid for environment, research and development aid, aid for rescue and restructuring, etc. However, the authorisation of these exemptions rests exclusively with the EC which has to be notified (except in certain instances) and to give its approval for an aid measure to be implemented by a Member State.

In order to facilitate the relationship between competition policy and public intervention, EC adopted in October 2008 a Communication showing the way in which state aid rules apply to the measures taken in support of financial institutions in the context of the current global crisis (*Banking communication*).[27] Thus, banks in difficulty have been granted cash or state guarantees for a limited period of time in order to keep them afloat.

Later on, however, when the crisis spread into the whole financial system as a result of the freeze in interbank lending, *i.e.*, since the bankruptcy of *Lehman Brothers*, the Commission complemented the banking guidance document of 13 October that created the framework for rescue operations by issuing a communication on how Member States can recapitalise banks in order to boost credit flows to the real economy in a manner consistent with Community state aid rules (*Recapitalisation Communication*). Another important EC decision targeting the financial sector consisted in setting up the framework that would allow Member States to clean-up balance sheets (*Impaired Asset Communication*).

However, at the community level, limiting competition distortions is vital in this sector just as in other sectors and, thus, the rescued banks which benefited from guarantee schemes, restructuring packages and other measures must provide restructuring plans and prove transparency by informing the European Commission with regard to the toxic assets. These restructuring plans aim to restore the long-term viability, to limit State aid to the minimum necessary (the private participation in covering restructuring costs) and to introduce certain compensatory measures in order to limit competition distortions and extracting market shares from viable banks.

Under current exceptional circumstances, the European Commission approved the aid plans to bail out the banks through capitalization, state guarantees, rescue and restructuring packages and other measures put in place by several Member States[28] such as Austria, Belgium, Germany, France, Finland, Sweeden, Italy, the Netherlands, Luxembourg, Ireland and the UK.

For instance, Germany granted liquidity facilities to *Sachsen LB*[29], *Hypo Real Estate*[30] and a risk shield to *IKB*[31] without which those banks would not have been able to continue their

[27] EC Communication on the application of state aid rules in the sector of financial institutions in the context of the global financial crisis, OJ C 270/02/2008, 25.10.2008.
[28] State Aid Scoreboard, Spring 2009 Update, 08.04.2009, Brussels, COM(2009) 164.
[29] Case C9/2008, Restructuring aid to *Sachsen LB* (decision 4.6.2008).

business. However, tough compensatory measures, such as selling or liquidating subsidiaries, abandoning proprietary trading and international real estate activities, significant own contribution, *i.e*. above 50 % of the restructuring costs – have been associated.

In the case of *WestLB*[32], the restructuring plan provided that the bank would entirely stop certain risky business activities, e.g. proprietary trading, thereby reducing its assets by 50%. Finally, Germany committed to change the bank's ownership structure through a public tender procedure before the end of 2011.[33]

At its turn, UK provided guarantees to *Northern Rock* which have been approved as rescue aid by the Commission[34] in December 2007. UK has subsequently notified a restructuring aid to the bank and the Commission opened a formal investigation. At the time of the writing, the case is still under assessment.[35]

UK mortgage bank *Bradford and Bingley*[36] got as well financial aid from the government, under similar conditionalities, like commitments to present restructuring plans, scaling down of its activities or selling of assets.

Commission also approved a rescue aid provided by Denmark to *Roskilde Bank*.[37] However, the aid did not take effect and Denmark decided to liquidate the bank in an orderly manner and granting full creditor protection.

In the particular case of Romania, no specific decision has been made to support the financial system. However, no bank in Romania registered financial problems. As part of its anti-crisis package of measures, the Romanian Government intended to increase the capital of its state-owned bank *CEC*, aiming at stimulating lending for SMEs. However, the recapitalization of the State-controlled CEC bank was deemed by the EC as a form of state aid if the Romanian government can not prove that it is acting like a prudent private investor. Moreover, it seems that it would have been much easier to get the approval if the bank would have been in difficulty. But this was not the case of CEC Bank.

Examples above show that making use, in particular, of the exemption allowed for rescue and restructuring, various EU Member States provided support, in particular to their financial systems in the current crises, but the conditions attached to those grants have been severe and have had as a main objective not to distort competition on the markets.

Overall, the total volume of crisis measures approved by the Commission in EU for the financial system up to end-March 2009 was about € 3,000 billion, i.e. around 24% of the EU GDP[38]. This figure represents the amount of guarantee umbrellas, rescue and restructuring packages and other measures. The amount of state aids will depend on the actual implementation of the measures. The schemes approved are under constant review in order to terminate them when the economic situation will improve.

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[30] Case NN44/2008, Rescue aid to *Hypo Real Estate* (decision 2.10.2008).
[31] Case C10/2008, Restructuring aid to *IKB* (decision 21.10.2008).
[32] Case C43/2008, *WestLB* risk shield.
[33] European Commission, IP/09/741.
[34] Case NN70/2007, *Northern Rock* (decision 5.12.2007).
[35] Case C14/2008, Restructuring aid to *Northern Rock* (under assessment).
[36] Case NN41/2008, Rescue aid to *Bradford & Bingley* (decision 1.10.2008).
[37] Case NN36/2008, *Roskilde Bank* (decision 31.7.2008).
[38] State Aid Scoreboard – Spring 2009 Update, Brussels, 08.04.2009, COM(2009) 164.

In the context of its European economic recovery plan, the Commission adopted as well a temporary framework providing Member States with additional ways of tackling the effects of the credit squeeze on the real economy. This new framework introduced a number of temporary measures to allow Member States to address companies' exceptional difficulties in obtaining finance. In particular, EU Member States including Romania are able to grant, without notification of individual cases, subsidised loans, loan guarantees at a reduced premium, risk capital for SMEs and direct aids of up to EUR 500,000. These aids are allowed until the end of 2010 and may be granted to firms which were not in difficulty on 1st of July 2008, but entered into difficulty thereafter. In other words, it is presumed that these firms are in difficulty not because their business model is wrong, but because they are affected by the global financial and economic crises.

Conclusions

The lesson coming from past experience should be clear. As one specialist recently said, "Keeping markets competitive is no less important during times of economic hardship than during normal times."[39] This is like driving on a highway. While it is important to drive safely on a beautiful day, it is even more important to follow the safety laws when it's icy, dark and raining, because that's when the bad things are most likely to happen.

This paper does not attack the idea of regulation. This is not the case, as regulation certainly has its place. In air transportation, for example, nobody argues with the idea of regulating safety. But regulation can go too far when it is employed only to exclude competition, which is typically justified in the interest of promoting "stability," "competitiveness," or other industrial policy goals. The trick, of course, is to find the right balance by weighing the cost of regulation against the benefits.

Why is this hard? It's hard because economic crisis creates an opportunity for those who would exclude competition to claim that the emergency situation justifies brushing aside sound competition principles with only the slightest glance, as Theodore Roosevelt did in 1907, and as US Congress did in the 1930s when it regulated the airline and trucking industries.

The important point is that the legitimate purpose of regulation must be carefully balanced with its impact on the functioning of competitive markets. We must recognize that those who would exclude competition will be quick enough to propose regulation that could bring benefits to them at the expense of consumers and will try to justify it on the basis of economic crisis without taking the trouble to measure the true costs and benefits.

On the other hand, examples in this article clearly reveal that the state support for the financial sector and real economy is massive. They also show that the largest interventions are made by the largest and strongest economies. Weaker or smaller economies can not afford such size of intervention.

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[39] Carl Shapiro, Deputy Assistant Attorney General for Economics, U.S. Department of Justice, "Competition Policy in Distressed Industries," Remarks Prepared for Delivery to American Bar Association Antitrust Symposium (May 13, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245857.htm.

So moving the clock forward again to 2009, we have another economic crisis. Have we learned our lesson this time? Both in EU and US, as well as in many other countries allover the world, committed antitrust enforcers are trying to maintain an undistorted competition in the markets. However, calls for the application of industrial policy are likely to persist, and competition authorities have to be vigilant in the years to come. The experience has been that these calls must be met with well reasoned arguments in favor of competition. While regulation may well be appropriate where the benefits of regulation exceed its costs, that does not justify casting aside what we have learned about the benefits of competition. Therefore, an increased and well functioning dialogue between the competition authorities, financial regulators and other public authorities, leading maybe to a certain flexibilisation in procedures (like quick decision-making processes), but not in rules, is extremely essential.

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